IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1951

No. 344

THE B. F. GOODRICH COMPANY, a corporation, *Petitioner,*

v.

THE STATE OF WASHINGTON and E. C. HUNTLEY, E. W. ANDERSON and DINSMORE TAYLOR, as the TAX COMMISSION OF THE STATE OF WASHINGTON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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To the Honorable, The Supreme Court of the United States

Your Petitioner respectfully shows:

SUMMARY OF THE MATTER INVOLVED

Your petitioner, The B. F. Goodrich Company, a corporation, seeks review of a decision of the Supreme Court

of the State of Washington holding that the Business and Occupation Tax of respondent State of Washington as imposed upon the petitioner does not discriminate against interstate commerce and therefore is a valid exercise of the taxing power of the State of Washington not in violation of the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3), and further holding that respondent's application of the Business and Occupation Tax of the respondent State of Washington to petitioner's Class A, B, C and D sales constitutes a valid tax levy not in violation of the Commerce Clause of the United States (Art. I, Sec. 8, Cl. 3).

The Washington Business and Occupation Tax is imposed pursuant to Chapter 180, Laws of Washington 1935, as amended, particularly by Chapter 5, Laws of Washington 1950, Extraordinary Session, and is known as the "Revenue Act of 1935, as amended."

The tax involved is a gross receipts tax levied and collected from every person engaged in business in the State of Washington for the privilege of so engaging in business.

This action involves the validity of the inclusion in the measure of the tax upon the petitioner receipts from portions of its wholesale sales in the State of Washington in which delivery of merchandise was made from a point outside of the State of Washington f.o.b. carrier in interstate commerce directly to the buyer in the State of Washington.

The Revenue Act of 1935, as amended (see Appendix A), imposes a tax upon the gross receipts of all persons for the purpose of engaging in business in the State of Washington, the rate and measure for calculation of the

amount being determined by reference to the particular classification into which the business activity falls. The Revenue Act, Sec. 4 (b) provides for a tax equivalent to ¼ of 1% on the value of products (including by-products) manufactured, and Sec. 4 (e) provides for a tax on wholesalers in an amount equivalent to ¼ of 1% of the gross proceeds of such business.

Sec. 6 provides for an exemption to local manufacturers, who are engaged as wholesalers, from the manufacturers' excise tax imposed by Sec. 4 (b) with respect to manufacturing products sold at wholesale.

By Rule 193 of respondent Tax Commission of the State of Washington (R. 11) all persons maintaining a stock of goods within the State, or maintaining a sales office within the State, or maintaining a salesman employee residing in the State are classified as "local vendors" subject to the imposition of the Business and Occupation Tax.

Rule 193 further provides that a sale is made in the State of Washington when possession of the property sold passes to the buyer in the State of Washington. Delivery to a carrier by seller for delivery to the buyer in the State of Washington constitutes delivery to the buyer in the State of Washington regardless of sales being made f.o.b. point of origin.

The effective date of Rule 193 (R. 11), in so far as this action is concerned, was August 1, 1950 (R. 10), and the rule at all times since has remained in full force and effect.

Rule 193 (R. 11) prior to August 1, 1950, was suspended following the decisions of the Supreme Court of the State of Washington in *Columbia Steel Company v.*

The State of Washington, 30 Wn. (2d) 658, 192 Pac. (2d) 903 (Certiorari denied 339 U. S. 976), and *Weyerhaeuser Sales Company v. State Tax Commission*, 30 Wn. (2d) 947, 192 Pac. (2d) 979 (Certiorari denied 339 U. S. 903), holding unconstitutional the Business and Occupation Tax of the State of Washington as to out-of-state manufacturers making sales in interstate commerce to purchasers within the State of Washington.

The tax struck down imposed the same tax as is involved in this case excepting that instead of exempting local manufacturer-wholesalers from the manufacturers' excise the statute exempted local manufacturer-wholesalers from the wholesalers' excise tax (Chapter 180, Laws of Washington 1935, as amended by Chapter 156, Laws of Washington 1943, Appendix B).

The Extraordinary Session of the legislature of the State of Washington (Appendix A) reversed the exemption so as to exempt local manufacturer-wholesalers from the wholesalers' excise seeking to eliminate the discriminatory features of the previous tax which taxed out-of-state manufacturer-wholesalers on sales in interstate commerce as to wholesale activities, but exempted local manufacturer-wholesalers from such tax by reason of their being taxable as manufacturers. The effect, however, of the tax is now the same as in the tax struck down.

The facts of the case are not in dispute and may be summarized as follows:

The petitioner, The B. F. Goodrich Company, is a New York corporation with its principal place of business in Akron, Ohio. The petitioner, as a foreign corporation, is qualified to do business in the State of Washington. Petitioner is a manufacturer and wholesaler of vari-

ous products and owns, maintains and operates twenty-two factories for the purpose of manufacturing merchandise, but does not manufacture any merchandise within the State of Washington, and all products sold to purchasers in the State of Washington by the petitioner are manufactured at its factories located outside of the State of Washington (R. 1, 31).

The petitioner, in sales within the State of Washington, or in sales to purchasers within the State of Washington, engages generally in three classifications of business:

(1) Purely local sales where the products sold by the petitioner are delivered from local stocks in the State of Washington to the purchaser within the State of Washington. As to this classification of sales the petitioner has paid all taxes due to the State of Washington, and no controversy exists between the petitioner and the respondents as to this classification of sales (R. 31).

(2) Sales for delivery out of Washington where the product sold by the petitioner is delivered from its local stocks in Washington by common carrier to purchasers at destinations outside of the State of Washington. As to the second classification of sales the State of Washington asserts no liability on the part of the petitioner for the payment of business and occupation taxes, and no controversy exists between the petitioner and the respondents as to this classification of sales (R. 31).

(3) Sales by the petitioner to purchasers within the State of Washington where delivery to purchasers within the State of Washington is made to the purchasers f.o.b. common carrier from points outside of the State of Washington, delivery to common carrier being made by the petitioner either directly from factories located outside

of the State of Washington or from merchandise stocks outside of the State of Washington. As to the third classification of sales a controversy exists between the petitioner and the respondents as to the liability of the petitioner for the payment of business and occupation taxes (R. 31).

The third classification of sales is sub-classified as follows. The petitioner engages in business in so far as purchasers within the State of Washington are concerned through four divisions:

(A) The Automotive, Aviation and Government Sales Division which normally sells products built to customer's specifications, sales being made to manufacturers, not for consumption, but for incorporation into articles manufactured by the purchaser (R. 31). Illustrative of the types of products sold are, for example, fuel tanks for aircraft incorporated in the aircraft in original construction, equipment to automotive manufacturers for incorporation into the construction of automobiles, etc. (R. 31.) This division maintains in the State of Washington one man and his secretary in the Seattle district office. This divison makes sales in the third classification only.

B. The Tire Replacement Sales Division deals with the sale of tires, tubes, batteries, repair materials and automotive accessories for the replacement trade as distinguished from the sales of the same products to manufacturers who incorporate the products into an article which they sell. These products are marketed in Washington through eleven retail stores owned and operated by the petitioner, and also through franchised dealers and distributors to whom the petitioner makes wholesale

sales. In addition to maintaining retail stores in the state of Washington, this division has a district office and warehouse in the City of Seattle. This division employs, in the State of Washington, excluding its employees in retail stores, as salesmen, ten office employees, seven staff members and one warehouseman. This division makes sales of the first, second and third classification (R. 31). Ordinarily dealer sales are solicited in this division by salesmen reporting to the Seattle district office and orders are filled either from Seattle, to the extent that its inventory will permit, or from the master warehouse of the petitioner at Portland, Oregon, or from factories located outside of the State of Washington (R. 31). The third classification of sales only is involved in this action.

C. The Industrial and General Products Division sells such products as industrial belting, conveyor belts and hose for industrial consumption. It maintains in Washington an office and eight employees, including three salesmen (R. 31). This division sells primarily through distributors. In some cases it sells to dealers and in still others, in the case of custom-built products requiring special engineering design, it sells directly to consumer. This division is serviced from (1) factory warehouses, all located outside of Washington, (2) the Seattle district warehouse, and (3) from the larger warehouse in Portland. Because of the nature of the product sold by this division, however, many items are factory shipped from one of the twenty-two factory locations of the company. This division makes sales in Washington of the first, second and third classifications. The third classification of sales only is involved in this action.

D. The Hood Rubber Division is a complete operating unit, managing its own manufacturing and sales opera-

tions, and sells rubber and rubber-soled canvas footwear, flooring, battery boxes, coated fabrics, etc. In Washington this division has sixteen employees, including salesmen, and maintains a footwear sales office and warehouse in Seattle. The Seattle office is under the direction of the Hood Rubber Company district manager in San Francisco. Salesmen working in the State of Washington report to the district manager in San Francisco. Orders received by such salesmen are processed through the Seattle office, as such orders are filled from Seattle warehouse stock, if available, and where credit is approved by the local warehouse credit manager. This division makes sales in Washington in the first, second and third classifications (R. 31).

The classification of the third class of sales is as follows:

Class "A" Sales. Sales by the Automotive, Aviation and Government Sales Division in the amount of $50,-598.81. The Washington division manager solicits orders from Washington purchasers. Orders received in Washington are acknowledged by the Washington division manager and are forwarded to the Akron main office for acceptance, and for approval as to delivery dates and specifications (whether petitioner can manufacture to specifications). Questions as to such orders are handled between factory at Akron and the purchaser, generally by telephone, telegraph, or correspondence, before a final acceptance of the order. Final acknowledgement and approval is made in Akron and transmitted to the Washington division office, which in turn notifies the customer of approval. The merchandise is delivered to the purchaser f.o.b. common carrier, Akron, Ohio, and billing is made from point of shipment (R. 1, 31).

Class "B" Sales. Sales by the Tire Replacement Sales and Industrial and General Products Divisions in the amount of $74,033.11. Orders are solicited and obtained from Washington purchasers by salesmen in the State of Washington, operating out of the Washington division office, and transmitted to the Washington division office, or, the orders are received by the Washington office of the division directly from the Washington purchaser; orders are accepted in Washington, and are sent to the petitioner's Portland, Oregon, master warehouse for filling. The merchandise is delivered to the purchaser, f.o.b. common carrier, Portland, Oregon, and billings on such shipments are made from Portland, Oregon (R. 1, 31).

Class "C" Sales. Sales by the Tire Replacement Sales and Industrial and General Products Divisions in the amount of $37,106.58. Orders are mailed by the Washington purchaser directly to the Portland, Oregon, office for merchandise not available in Washington. If the purchaser had previously obtained a dealer franchise and credit approval for such purchasers from petitioner's Washington division office, and notice thereof had been sent to Portland, the orders are accepted and filed in Portland, Oregon. If no such franchise or credit approval has been granted, the order is referred to the Washington division office for the granting of a franchise and credit approval, upon which, if granted, the order is filled from Portland. The merchandise is delivered to the purchaser, f.o.b. common carrier, Portland, Oregon, and billings on such shipments are made from Portland, Oregon (R. 1, 31).

Class "D" Sales. Sales by the Hood Rubber Division, in the amount of $4,029.48. Orders for footwear, of the type not warehoused in Washington, are solicited and obtained from purchasers by salesmen in Washington,

operating out of the Washington division office, and transmitted to the Washington division office, or, the orders are received by the Washington division office directly from the Washington purchaser. After a purchaser's credit is approved in Washington, the orders are sent to petitioner's Watertown, Massachusetts, main office, where the order is accepted if the merchandise is available. The merchandise is delivered to the purchaser, f.o.b. common carrier, Watertown, and billings are made from Watertown, Massachusetts (R. 1, 31).

Class "E" Sales. Sales by the Hood Rubber Division, in the amount of $13,147.06. Orders for flooring material are mailed by Washington purchasers directly to the San Francisco, California office of the company, where such merchandise is stocked, or are mailed directly to the main office of the company in Watertown, Massachusetts. No flooring material is stocked in Washington. The merchandise is shipped from Watertown or San Francisco, and delivery is made to the purchaser f.o.b. common carrier, at point of shipment. Billings are made from the point of shipment (R. 1, 31).

Class "F" Sales. Sales by the Hood Rubber Division to the J. C. Penney Company in the amount of $36,094.92. These sales are a result of a contract negotiated between the Hood Rubber Division main office at Watertown, Massachusetts, and the home office of the J. C. Penney Company at New York City, New York. Washington outlets of the J. C. Penney Company receive merchandise by virtue of orders placed by such Washington outlets with the home office of the J. C. Penney Company in New York, which office transmits the orders to the Hood Rubber Company's main office in Watertown. Delivery of the merchandise is made to the purchaser f.o.b. common

carrier, Watertown, Massachusetts. Billings to the J. C. Penney Company are made from Watertown, Massachusetts, to the home office of the J. C. Penney Company in New York City, from which office payment is received (R. 1, 31).

The Supreme Court of the State of Washington held that taxation measured by the gross receipts of the foregoing classes of sales in Class A, B, C, and D was permissible under the Interstate Commerce Clause of the United States Constitution (R. 41), and held that receipts from Class E and F sales were not to be considered in the measure of tax, being prohibited by the Interstate Commerce Clause of the United States Constitution.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction under sec. 1257 (3) United States Code, Judiciary and Judicial Procedure.

The Supreme Court of the State of Washington has held that the business and occupation tax as imposed upon petitioner in classes A, B, C and D sales is valid and not prohibited by the Commerce Clause of the United States Constitution, Art. I, sec. 8, cl. 3. The Washington statute involved is Title II, Chapter 180, Washington Laws of 1935, as amended, herein designated as the "Revenue Act of 1935, as Amended." A portion of Title II, imposing the business and occupation tax, is set out in Appendix A. Rule 193 of the respondent Tax Commission of the State of Washington is found in the record (R. 11). The *en banc* opinion of the Supreme Court of Washington was filed on May 15, 1951 (R. 41) and as provided in sec. 5, ch. 24, Washington Laws of 1909, the decision did not become final. Pursuant to law, petitioner pe-

titioned the Supreme Court of the State of Washington for a rehearing (R. 54). Thereafter and on June 26, 1951, the Supreme Court of the State of Washington entered its order denying petitioner's petition for rehearing (R. 59). The judgment of the Supreme Court of the State of Washington thereupon became final.

This petition is filed within 90 days after the entry of the order denying petitioner's petition for rehearing. Sec. 2101 (c), Judicial Code. The judgment is final, being rendered by the highest court of the State in which a decision could be had, and, is such a judgment as is here subject to review.

Puget Sound Power & Light Co. v. King County, 264 U.S. 22.

The judgment is in the hands of the Supreme Court of Washington, execution thereof having been stayed (R. 61); accordingly, the writ should be directed to that court.

The federal constitutional issues are properly preserved. The facts have never been in dispute, and the sole issue involved has at all times been whether the tax applied violated the Commerce Clause of the United States Constitution.

This action has at every stage been decided upon the federal question. The issue was framed in the following manner:

The respondent Washington State Tax Commission, pursuant to its rule-making power, promulgated Rule 193 (R. 11), effective August 1, 1950 (R. 10) relating to the federal question declaring therein the business and occupation tax to be payable from and after August 1, 1950, under such facts as are present in the instant case.

Pursuant to such rule, notice of deficiency in payment of tax (R. 18, 19) was served by respondent upon petitioner. Petitioner petitioned the respondent Tax Commission of Washington for correction of business and occupation tax (R. 20). Respondent Tax Commission of Washington issued its order denying petitioner's petition (R. 25). Petitioner thereupon instituted an action against respondents in the Superior Court of the State of Washington to enjoin the collection of the tax assessed alleging in its complaint that the tax levied and assessed was prohibited by the Commerce Clause of the Constitution of the United States (Art. I, sec. 8, cl. 3), and that petitioner was exempt from such tax under section 12 (f) of the Revenue Act of 1935, as amended (R. 1). The respondents answered (R. 27) and upon trial judgment was entered by the Superior Court (R. 38). Petitioner appealed to the Supreme Court of the State of Washington from that portion of the judgment of the Superior Court adverse to petitioner (R. 39), and respondents cross-appealed from that portion of the judgment of the Superior Court adverse to respondents (R. 40).

On appeal to the Supreme Court of the State of Washington the federal question was the sole issue before the Court and was the basis of its decision, and in so far as it was adverse to petitioner follows:

> "The statute, by authority of which it is sought to include within the measure of apellant's tax the proceeds of these sales, is Rem. Rev. Stat., secs. 8370-4 (P.P.C. sec. 965-1) *et seq.*, as amended by chapter 5, Session Laws of 1950, Extraordinary Session.
>
> ". . . As amended in 1943, this statute provided that persons taxable as manufacturers should not be taxable as wholesalers. Rem. Supp. 1943, sec. 8370-6. As so written, we held that it marked an unconstitutional discrimination against interstate com-

merce, in that it levied a tax upon wholesale activities of those engaged in such commerce, while exempting those who performed the same taxable act, to wit, the sale at wholesale, if they manufactured in the state of Washington. *Columbia Steel Co. v. State*, 30 Wn. (2d) 658, 192 P. (2d) 976; *Weyerhaeuser Sales Co. v. State Tax Commission*, 30 Wn. (2d) 947, 192 P. (2d) 979. In an attempt to cure this defect, the legislature, in its extraordinary session of 1950, rewrote the statute in the form quoted above, so that it now lays a tax equally upon all those selling at wholesale within the state, but further provides that those who are taxed as wholesalers shall not be taxed as manufacturers. The procedure for exemption of those who perform both the taxable acts of manufacture and sale has thus been exactly reversed; the local manufacturer-wholesaler, instead of being exempt from tax as a wholesaler, is instead exempt as a manufacturer.

". . . But though this statute may no longer be open to the charge that it is, in the respect under consideration, discriminatory, the question yet remains of whether, as construed by the tax commission, it marks an unconstitutional levy upon interstate commerce. Article 1, Section 8, of the Federal constitution, of course, gives to the Congress the power to regulate commerce among the several states; and it has been assumed that this clause restricts the states as to the manner in which they may tax an interstate business.

". . . With the exception of its holding with respect to the sales denominated class E, the proceeds of which we hold to be not constitutionally taxable under the state's business and occupation tax, the judgment of the trial court is affirmed in its entirety . . ."

QUESTION PRESENTED

The question presented is whether the Washington State business and occupation tax, as imposed upon the petitioner, The B. F. Goodrich Company, a New York corporation qualified to do business in the State of Washington, and engaged in the sale in interstate commerce of

merchandise manufactured outside of the State of Washington to purchasers within the State of Washington, which tax is levied directly upon the petitioner, and measured by a percentage of its gross sales, is within the prohibitions of the Interstate Commerce Clause of the United States Constitution, Article I, sec. 8, cl. 3.

REASONS FOR ALLOWANCE OF THE WRIT

The reasons relied upon by petitioner for the allowance of the writ are as follows:

1. That the validity of the business and occupation tax of the State of Washington in so far as it purports to levy a tax in connection with transactions in interstate commerce and as involved in this action, and the application of the tax by respondent Tax Commission of the State of Washington to the type of transactions involved in this action have not heretofore been determined by the Supreme Court of the United States and an important federal question is involved under the Interstate Commerce Clause of the United States Constitution.

2. The tax levied is a privilege tax for the privilege of engaging in business in the State of Washington and is unapportioned, the tax being measured by a percentage of petitioner's gross sales in interstate commerce and being unapportioned is in conflict with the decision of *Adams Manufacturing Company v. Storen,* 304 U. S. 307.

3. The tax imposed creates a burden on interstate commerce contrary to the decision of this court in *Freeman v. Hewit,* 329 U. S. 249, 67 S. Ct. 274.

4. The petitioner feels that the Supreme Court of the State of Washington has not properly applied the

case of *McLeod v. Dillworth Co.*, 322 U. S. 327, particularly as to Class A sales wherein the only local condition existing is a resident rather than a traveling manager or salesman. As to this classification of sales the petitioner knows of no decision of the Supreme Court of the United States touching squarely upon the facts, and no decision of the Supreme Court of the United States which would render this type of sale taxable.

5. The Supreme Court of the State of Washington, in the opinion of the petitioner, has misconstrued the case of *Norton v. Department of Revenue of Illinois*, 340 U. S. 534, in so far as it applies to Class C sales in which classification of sales no local taxable event occurs, and the question involved as to the granting of dealer franchises and approval of credit in the State of Washington as the same may affect the right to tax has, in the opinion of the petitioner, not been determined by any decision of the Supreme Court of the United States.

6. That in the opinion of the petition the factual situations presented by class B and D sales have not heretofore been squarely presented to the Supreme Court of the United States with relation to the right to impose a tax as herein involved.

7. The decision of the Supreme Court of the State of Washington, in the opinion of the petitioner, erred in holding that *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, was inapplicable as to any of petitioner's classification of sales.

8. The tax imposed creates a burden on interstate commerce within the prohibitions of the Interstate Commerce Clause of the Constitution of the United States, as

determined in *Freeman v. Hewit*, 329 U. S. 249, 67 S. Ct. 274, and *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602.

9. That the business and occupation tax of the State of Washington, as amended, by the Laws of Washington, Extraordinary Session 1950, and as applied by the respondent Tax Commission of the State of Washington, has not been before the Supreme Court of the United States. That in so far as the tax is assessed so as to constitute a direct tax upon the proceeds of sales in interstate commerce an important federal question is involved under the Commerce Clause of the United States Constitution which should be determined by this court for the benefit not only of the petitioner, but all other persons engaged in interstate commerce making sales to persons within the State of Washington, and likewise for the benefit of the State of Washington itself in reference to its taxing powers.

WHEREFORE, your petitioner prays that a writ of certiorari issue from this court directed to the Supreme Court of the State of Washington to the end that the opinion and judgment of the Supreme Court of the State of Washington holding that the business and occupation tax of the State of Washington as imposed upon the petitioner with reference to Class A, B, C and D sales as not being repugnant to the Interstate Commerce Clause of the United States Constitution may be reviewed and determined by this court and that the judgment below sustaining the validity of the tax upon petitioner's Class A, B, C and D sales be reversed by this court, and that this

court may render such further relief to the petitioner as it may deem proper.

Dated this 21st day of September, 1951.

Respectfully submitted,

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BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of Washington on the appeal thereto of this cause (R. 41, Appendix C) as found in the advance sheets of Washington Decisions, Vol. 138, No. 14, at p. 625. The opinion is not as yet printed in the official reports.

JURISDICTION

The opinion of the Supreme Court of the State of Washington was rendered May 15, 1951, and the judgment of the Supreme Court of the State of Washington became final upon the denial of the petitioner's Petition for Rehearing to said court, which order was made and entered on the 26th day of June, 1951. The statutory provision which sustains the jurisdiction of this court is sec. 1257 (3), Title 28, United States Code, Judiciary and Judicial Procedure. This petition is filed within ninety days of the entry of the order denying such petition for re-hearing, sec. 2101 (c), Judicial Code. The sole issues below were whether the tax was repugnant to the Federal Constitution, and the tax as applied was repugnant to the Federal Constitution.

A complete statement of the proceedings below leading up to the final judgment of the Supreme Court of the State of Washington is contained in the preceding petition, which is hereby adopted and made a part of this brief.

STATEMENT OF THE CASE

Petitioner is a corporation organized and existing under the laws of the State of New York with its principal place of business in Akron, Ohio. Petitioner has qualified to do business in the State of Washington, and is doing business in the State of Washington. It concedes and pays its business and occupation tax upon local business as is measured by the gross volume of its local sales. No controversy exists as to local sales.

Petitioner contends that it is exempt from the taxes measured by the receipts from sales in interstate com-

merce to Washington buyers where goods enter Washington in interstate commerce, and delivery is made to the Washington State purchaser f.o.b. point of shipment outside of the State of Washington. There is no dispute as to the facts.

A more detailed summary of facts is set out in the preceding petition, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

The Supreme Court of Washington erred in holding that the Washington business and occupation tax, as applied to petitioner, in regard to its interstate sales, in Classes A, B, C and D is not repugnant to and within the prohibitions of the Commerce Clause of the United States Constitution (Art. I, sec. 8, cl. 3).

The court further erred in declining to consider the argument that as to Class A, B, C and D sales of the petitioner the case falls within the rules pronounced by this court in *Adams Manufacturing Company v. Storen,* 304, U. S. 307; *Freeman v. Hewit,* 329 U. S. 249; *McLeod v. Dillworth Co.,* 322 U. S. 327; *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602, and in the opinion of the petitioner misconstrued the decision of this court in *Norton v. Department of Revenue of Illinois,* 340 U. S. 534, as sustaining the tax imposed in petitioner's Class A, B, C and D sales.

The court further erred in failing to find that the tax imposed does, in fact, discriminate against interstate commerce, and constitutes a burden upon interstate commerce within the prohibitions of the Commerce Clause of the United States Constitution.

ARGUMENT

I.

In holding that the Washington State business and occupation tax, as levied against the petitioner, and as applied to petitioner in its Class A, B, C and D sales, is a valid exercise of the state's power of taxation although the sales involved were in interstate commerce, the Supreme Court of the State of Washington has decided federal questions of substance not heretofore directly passed upon by this court, and in a way not in accord with principles established in analagous cases.

A. The Supreme Court of the State of Washington Improperly construed Norton Company v. Department of Revenue of Illinois, 340 U. S. 534, as Applied to the Facts Involved in This Action.

As has been heretofore set forth in the annexed petition, the petitioner, The B. F. Goodrich Company, engages in three classifications of business:

1. Briefly local business where goods are sold out of local stocks. All taxes due the State of Washington have been paid as to this type of sale.

2. Sales for delivery out of the State of Washington from local stocks. No tax question is involved as to these sales.

3. Sales in interstate commerce from points outside of the State of Washington to Washington state purchasers; delivery being made directly to purchaser by delivery to carrier f.o.b. point of shipment. Billings are made and credits are carried from point of shipment. No goods of any kind are manufactured in the State of Washington. The third class of sales has been divided into Class A, B, C, D, E and F as set forth in the petition. Class A, B, C and D only are involved herein.

No co-mingling of business by petitioner of taxable business and that which it contends is non-taxable has

been made as did the Norton Company in *Norton Company v. Department of Revenue of Illinois,* 340 U. S. 534, and each classification of sale is involved solely upon its own factual basis.

The tax involved is a tax measured by gross receipts of wholesale sales and is a privilege tax for the privilege of engaging in business. Appendix A.

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650;

Puget Sound Stevedoring Company v. State Tax Commission, 302 U. S. 90.

Briefly summarizing Class A, B, C and D sales the following facts are applicable to each class of sale:

A. The merchandise is manufactured outside of the State of Washington.

B. Orders are filled outside of the State of Washington.

C. Delivery is made to purchaser in the State of Washington by delivery to common carrier f.o.b. point of shipment.

D. Billing is made from point of shipment.

The only variances as to each class of sales herein involved are as follows:

1. In Class A sales products are made for incorporation into articles manufactured by the purchaser for consumption, and are built to customer specifications. One man and his secretary are maintained in the State of Washington. He merely receives orders which are accepted by the factory if the customer's specifications can be met. All negotiations are carried on between the factory and the customer direct.

2. The sales of merchandise in Class B sales are solicited by salesmen in the State of Washington, and in the event local stocks of merchandise warehoused cannot fill the order, the orders are sent to the master warehouse in Portland, Oregon, for filling.

3. Class C sales cover merchandise not available in the State of Washington where orders are sent directly by the purchaser to Portland, Oregon, or elsewhere for filling. The only condition being that the credit of Washington State purchasers is approved by the Washington State office and a dealer franchise has been granted by the Washington State office. No solicitations take place in the State of Washington.

4. Sales of footwear of a type not warehoused in Washington are solicited and obtained by salesmen in Washington, or orders therefor are received by the Washington office direct from purchaser. Orders are forwarded to Watertown, Massachusetts, for approval and acceptance. Credit of the Washington State purchaser is approved by the Washington State office.

The Supreme Court of the State of Washington applied *Norton Company v. Department of Revenue of Illinois, supra,* to each of these four classifications of sales holding that receipts from such sales were subject to the measure of the tax; in our opinion overlooking the fact that in the *Norton* case sales in interstate commerce were permitted to be taxed by reason of the fact that:

> "Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of these taxes is on the buyer or user. Cases involving them are not controlling here, for this tax falls upon the vendor."

> "Of course, in constitutional cases, we have the power to examine the whole record to arrive at an

> independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine as a court of first instance, findings of fact supported by substantial evidence. This corporation has so mingled taxable business with that which it contends is non taxable that it requires administrative and judicial judgment to separate the two."

and while recognizing that the *Norton* case held that one may engage in local business without losing its right to engage in interstate commerce free of the burden of local taxation, the Supreme Court of the State of Washington disregarded the right to engage in such commerce free of such burden, and further erroneously held that although the *Norton* case, *supra,* affrmed *McLeod v. Dillworth Co., supra,* the *McLeod* case was not applicable to the facts in this case.

We know of no case which has decided that a tax measured by gross receipts of sales in interstate commerce, payable directly by an out of state manufacturer, is a valid tax and not prohibited by the Commerce Clause of the United States Constitution where the local event as in Class A sales is merely the solicitation and receipt of orders by a resident manager as distinguished from a traveling salesman, or as in Class C sales where the only local event is the granting of a dealership franchise and credit approval, which in itself has nothing to do with the sale and is merely a condition precedent to the right of purchase, nor as in Class D sales where the only local event is a solicitation or receipt of orders for a type of merchandise not available in the State of Washington and credit approval.

We recognize that Class B sales are more questionable where solicitation occurs in the State of Washington and

orders are filled from warehouses in the State of Washington to the extent that inventories will permit. Where, however, inventories will not permit orders are transmitted to out-of-state warehouses or factories for filling.

B. That the Tax as Applied Equally to Local Wholesalers and Wholesalers in Interstate Commerce Is Not the Test Nor Is Qualification to Do Business and the Maintenance of Local Personnel the Test as to Constitutionality of the Tax.

The imposition of the business and occupation tax upon petitioner in the sales in interstate commerce in classes A, B, C and D sales cannot be sustained on the theory that local manufacturers are assessed at the same rate of tax. *Spector Motor Service, Inc. v. O'Connor,* 340 U. S. 602. Nor does the qualification to do business within a state, the maintenance of resident personnel within the state, nor the maintenance of facilities within the state subject a person, if engaged in interstate commerce, to a tax measured by gross receipts of business. *Spector Motor Service, Inc. v. O'Connor, supra.*

II.

The decision is in conflict with decisions of this court as well as being in conflict with principles established by this court.

A. The Decision Below Conflicts With Numerous Decisions of This Court.

The court below declined to consider the authority of cases decided by this court dealing with burdens on interstate commerce prohibited by the Commerce Clause of the United States Constitution, and referring to the *Norton* case, *supra,* said:

> "For our purposes, the crucial sentence in the majority opinion, and the one which sets forth the test we must apply in deciding this case, is the following: 'Although the concern does not, by engaging

> in business within the State, lose its right to do interstate business with tax immunity, *Cooney v. Mountain States Telegraph Co.*, 294 U. S. 384, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business.' " (R. 41.)

In this case there is no channeling of business through a local outlet to gain the advantage of a local business and hold the immunities of interstate business.

The court below failed to consider the lack of apportionment of the tax in accordance with the rule of *Adams Manufacturing Company v. Storen*, 304 U. S. 307, and disregarded the rule announced in *Freeman v. Hewit*, 329 U. S. 249, stating:

> "Our starting point is clear. In two recent cases we have applied the principle that the commerce clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force, created an area of trade free from interference by the states. In short, the commerce clause, even without supplementing legislation by Congress, is a limitation on the power of the states."

And likewise the court below indirectly determined that the statute was not subject to the attack of discrimination in failing to recognize that the petitioner, manufacturer-wholesaler, while being required to pay a tax on its gross proceeds of wholesale sales to Washington State purchasers as do local manufacturers, that by reason of the exemption of the local manufacturer-wholesaler from manufacturer's tax, such a burden could be imposed by any of the states where petitioner's twenty-two factories are located. The rule against multiple burden of taxation is announced in *Adams Manufacturing Company v. Storen, supra*, and the proof of such multiple burden is unnecessary. Only the possibility of its existence is necessary. *Freeman v. Hewit, supra.*

CONCLUSION

In the instant case the only matters involved concern the federal question as to the validity of the Washington State business and occupation tax in so far as it applies to wholesale sales in interstate commerce to Washington state purchasers by the petitioner, an out-of-state manufacturer. None of the petitioner's local business is involved. There is no channeling of business through local outlets, nor have the respondents ever contended that the interstate business of the petitioner was channeled through local outlets.

The sole questions presented are whether or not the taxes imposed measured by the gross receipts of the petitioner from its sales in interstate commerce in Classes A, B, C and D are in contravention of the commerce clause of the United States Constitution.

We respectfully submit that the factual situations in each class of sales are of extreme importance to the petitioner, and to other businesses involved in interstate commerce transactions with residents in the State of Washington from the standpoint of determining whether under the United States Constitution such transactions are in fact taxable by the State of Washington. Likewise of extreme importance to the petitioner and others similarly situated is the validity of the Washington State statute imposing the tax, and the exercise of power by the respondent Tax Commission.

We submit that the decision of the Supreme Court of tthe State of Washington is contrary to the decisions of the Supreme Court of the United States in so far as it affects the classes of sales involved in this petition.

We further submit that it is of extreme importance that the business and occupation tax of the State of Washington be before the Supreme Court of the United States for determination of the taxing power of the State of Washington of transactions in interstate commerce, and particularly where the tax is assessed directly against the seller measured by the volume of seller's business. The present act, as amended, has not previously been before the Supreme Court of the United States, and the importance of the federal questions involved under the Commerce Clause of the United States Constitution involved in this action is such that the petition should be granted.

We respectfully submit that the petition for writ of certiorari herein should be granted.

Respectfully submitted,

JOHN J. KENNET,
Counsel for Petitioner,

CLIFFORD HOOF,
GERALD D. HILE,
GERALD SCHUCKLIN,
Of Counsel for Petitioner.

Appendix A

REVENUE ACT OF 1935

[Chapter 180, Laws of 1935[1]]

TITLE II. BUSINESS AND OCCUPATION TAX[2]

[1]Remington's Revised Statutes of Washington, § 8370-1 *et seq.*
[2]As amended and in effect during the period covered by this action.

SEC. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

(a) Upon every person engaging within this state in business as an extractor; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, extracted for sale or for commercial or industrial use, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products, including by-products, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state;

(b) Upon every person except persons taxable under paragraph (2) of subsection (d) below engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products, including by-products, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state;

(c) Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one per cent;

(d) (1) Upon every person engaging within this state in the business of buying wheat, oats, corn and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax herein imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one per cent;

(d) (2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multiplied by the rate of one-eighth of one per cent;

(e) Upon every person except persons taxable under subsection (d) (1) above engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent;

(f) Upon every person engaging within this state in the business of: (1) printing, and of publishing newspapers, periodicals or magazines; (2) building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used, or to be used, pri-

marily for foot or vehicular traffic; as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of one-quarter of one per cent;

(g) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d), (e) and (f) above; as to such persons the amount of tax on account of such activites shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale" as defined herein. (Section 1, Chapter 5, Washington Laws of 1950, Ex. Ses.)

SEC. 5. For the purposes of this title, unless otherwise required by the context:

* * *

(b) The word "person" or word "company," herein used interchangeably, means any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, corporation, association, society, or any group of individuals acting as a unit, whether mutual, co-operative, fraternal, non-profit or otherwise and the United States or any instrumentality thereof;

(c) The word "sale" means any transfer of the ownership of, title to, or possession of property for a valuable

consideration and includes any activity classified as a "sale at retail" or "retail sale" under subsection (d) of this section. It includes conditional sale contracts, leases with option to purchase, and any other contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It shall also be construed to include the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

The term "casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved.

(d) The term "sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated or imprinted) other than a sale to one who purchases for the purpose of resale as tangible personal property in the regular course of business or for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale. The said term also means every sale of tangible personal property to persons engaged in any business which is taxable under section 4 (f) (2) and section 4 (g) hereof.

The term "sale at retail" or "retail sale" shall be construed to include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (1) the installing,

repairing, cleaning, altering, imprinting or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds and insects; (2) the constructing, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the moving of earth to the extent necessary for such constructing or improving, unless the charge therefor is stated separately from other charges made in connection with the work performed, under such rules as the Tax Commission may prescribe.

The said term shall not include the sale of or charge made for labor and services rendered in respect to the mere cleaning, fumigating, razing, or moving of existing buildings or structures, or the building, repairing or improving of any publicly owned street, place, road, highway, bridge or trestle which is used or to be used primarily for foot or vehicular traffic, nor shall it include sales of feed, seed, fertilizer, and spray materials to persons for the purpose of producing for sale any agricultural product whatsoever, including milk, eggs, wool, fur, meat, honey or other substances obtained from animals, birds or insects.

(e) The term "sale at wholesale" or "wholesale sale" means any sale of tangible personal property and any sale of or charge made for labor and services rendered in respect to real or personal property, which is not a sale at retail;

(f) The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses;

(g) The term "gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments, however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses;

(h) The term "value proceeding or accruing" means the consideration, whether money, credits, rights or other property expressed in terms of money, actually received or accrued. The term shall be applied, in each case, on a cash receipts or accrual basis according to which method of accounting is regularly employed in keeping the books of the taxpayer. The Tax Commission may provide by regulation that the value proceeding or accruing from sales on the installment plan under conditional contracts of sale may be reported as of the dates when the payments become due;

* * * (Section 2, Chapter 228, Washington Laws of 1949.)

SEC. 6. Every person engaging in activities which are within the purview of the provisions of two or more paragraphs (a), (b), (c), (d), (e), (f), and (g) of section 4, shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however,* That persons taxable under paragraphs (c) or (e) of said section shall not be taxable under paragraphs (a), (b) or (d)(2) of said section with respect to extracting or manufacturing of the products so sold. (Section 2, Chapter 5, Washington Laws of 1950, Ex. Ses.)

SEC. 7. The value of products, including by-products, extracted or manufactured shall be determined by the gross proceeds derived from the sale thereof whether such sale is at wholesale or at retail, to which shall be added all subsidies and bonuses received from the purchaser or from any other person with respect to the extraction, manufacture, or sale of such products or by-products by the seller, except:

(a) Where such products, including by-products, are extracted or manufactured for commercial or industrial use;

(b) Where such products, including by-products, are shipped, transported or transferred out of the state, or to another person, without prior sale or are sold under circumstances such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale.

In the above cases the value shall correspond as nearly as possible to the gross proceeds from sales in this state of similar products of like quality and character, and in similar quantities by other taxpayers, plus the amount of subsidies or bonuses ordinarily payable by the

purchaser or by any third person with respect to the extraction, manufacture, or sale of such products. The Tax Commission shall prescribe uniform and equitable rules for the purpose of ascertaining such values. (Section 3, Chapter 228, Washington Laws of 1949.)

SEC. 8. Any person rendering services and maintaining places of business both within and without this state shall, for the purpose of computing tax liability under this title, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state. (Section 5, Chapter 178, Washington Laws of 1941.)

SEC. 12. In computing tax there may be deducted from the measure of tax the following items:

* * *

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

* * * (Section 3, Chapter 249, Washington Laws of 1945.)

SEC. 14. It is not the purpose of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the intention that such taxes shall be levied upon, and

collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business. (Section 14, Chapter 180, Washington Laws of 1935.)

Appendix B

TITLE II. BUSINESS AND OCCUPATION TAX

[Chapter 180, Laws of 1935[1]]

[1]As amended and in effect prior to this action.

SEC. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

(a) Upon every person engaging within this state in business as an extractor; as to such persons the amount of tax with respect to such business shall be equal to the value of the products, including by-products, extracted for sale or for commercial or industrial use, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products, including by-products, so extracted, regardless of the place of sale or the fact that deliveries may be made to points outside the state;

(b) Upon every person except persons taxable under paragraph (2) of subsection (d) below engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-

products, manufactured, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products, including by-products, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state;

(c) Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one quarter of one per cent;

(d) (1) Upon every person engaging in this state in the business of buying wheat, oats, corn and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax herein imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of one one-hundredth of one per cent;

(d) (2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multiplied by the rate of one-eighth of one per cent;

(e) Upon every person except persons taxable under subsection (d) above engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent;

(f) Upon every person engaging within this state in the business of: (1) printing, and of publishing news-

papers, periodicals or magazines; (2) building, repairing or improving any publicly owned street, place, road, highway, bridge or trestle which is used, or to be used, primarily for foot or vehicular traffic; as to such persons, the amount of tax on such business shall be equal to the gross income of the business multiplied by the rate of one-quarter of one per cent;

(g) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d), (e) and (f) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale" as defined herein. (Section 1, chapter 228, Laws of 1949.)

SEC. 6. Every person engaging in activities which are within the purview of the provisions of two or more paragraphs (a), (b), (c), (d), (e), (f), and (g), of section 4, shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however,* That persons taxable under paragraphs (a), (b) or (d) (2) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons. (Section 2-A, Chapter 228, Laws of 1949.)

Appendix C

THE B. F. GOODRICH COMPANY, *Appellant*, v. THE STATE OF WASHINGTON *et al.*, *Respondents.*[1]

[1] Taxation—Constitutional Law—Commerce—Taxation of Property Employed in Commerce—Tax on Out-of-State Manufacturer Selling at Wholesale—No Discrimination.

[2] Commerce—Taxation of Property Engaged in Interstate Commerce—Sales Not Connected With Local Activity—Tax Invalid.

[3] Same—Order and Delivery Direct Between Purchaser and Out-of-State Manufacturer—Tax Invalid.

[4] Same—Effect of Indispensable Services Rendered by Local Office.

Cross-appeals from a judgment of the superior court for Thurston county, Wright, J., entered December 14, 1950, upon findings partially in favor of each party, determining the validity of a tax upon the proceeds from sales at wholesale, and granting injunctive relief. Affirmed in part and reversed in part.

Hile, Hoof & Shucklin, for appellant.

The Attorney General and *C. John Newlands, Assistant*, for respondents and cross-appellants.

ROBINSON, J.—This action was brought to enjoin the recovery of certain business and occupation taxes assessed by the tax commission of the state of Washington. Appellant, the B. F. Goodrich Company, contends that the assessment of these taxes is in violation of the commerce clause of the United States constitution.

Appellant, a New York corporation qualified to do business in the state of Washington, is a manufacturer and wholesaler of various products. It engages in no manufacturing within this state, but its local selling activities are numerous and varied. Those sales, the gross receipts from which, appellant urges, have been improperly included within the measure of its business and occupation tax, may be divided into five general classifications, as follows:

Class A sales: These are sales by appellant's Automotive, Aviation, and Government Sales Division, which sells products to manufacturers, not for consumption, but for incorporation into articles manufactured by the purchasers, for example, fuel tanks for aircraft. This division maintains in Washington an office, a manager, and a secretary. The division manager solicits orders from Washington purchasers. These orders are received and acknowledged by him, and forwarded to appellant's main office at Akron, Ohio. Final acknowledgment and approval is made at Akron and transmitted to the Washington division office which, in turn, notifies the customer. The merchandise is shipped directly to the purchaser, f.o.b. Akron.

Class B sales: These include sales by the Tire Replacement Sales Division, which handles sales of various automotive and domestic accessories for the replacement trade, as distinguished from sales of similar products to manufacturers for incorporation into products which they, in turn, sell; and sales by the Industrial and General Products Division, which sells items such as industrial belting, either through distributors or directly to consumers. The Tire Replacement Sales Division has nine salesmen, ten office employees, seven staff members, one warehouseman, and one hundred and one other employees in Washington. The products it handles are marketed through eleven retail stores owned and operated by appellant, and also through franchise dealers and distributors to whom wholesale sales are made. The Industrial and General Products Division maintains in Washington eight employees, including three salesmen. Both these divisions operate offices in Washington, and each

maintains a warehouse containing a considerable inventory.

Those sales, denominated class B, are initiated when orders are solicited and obtained from Washington purchasers by salesmen operating out of the Washington division offices, or when orders are received by these offices directly from the Washington purchasers. The orders are accepted in Washington and sent to appellant's Portland, Oregon, warehouse for filling. The merchandise is shipped directly to the purchasers, f.o.b. Portland.

Class C sales: These are also sales made by the Tire Replacement Sales and Industrial and General Products Divisions. Orders for merchandise not available in Washington are mailed by the Washington purchaser directly to the Portland office. If the purchaser has previously obtained a dealer franchise and credit approval for such sales from the proper Washington division office, and notice thereof has been sent to Portland, the orders are accepted and filled in Portland. If no such franchise or credit approval has been granted, the orders are referred to the Washington division office in order that this may be done. If the Washington office grants such franchise and credit approval, the merchandise is shipped directly to the purchaser, f.o.b. Portland.

Class D sales: These are sales by the Hood Rubber Division, which is a complete operating unit, managing its own manufacturing and sales operations. It sells such articles as rubber and rubber-soled canvas footwear, flooring, battery boxes, and coated fabrics. In Washington, this division has sixteen employees, including salesmen, and it maintains a footwear sales office and warehouse in Seattle. Orders for footwear, of a type not ware-

housed in Washington, are solicited and obtained from Washington purchasers by salesmen operating out of the Washington division office, or they are received by this office directly from the Washington purchasers. After the approval of the purchasers' credit in Washington, the orders are sent to the main office of the Hood Rubber Division in Watertown, Massachusetts, where they are accepted, if the merchandise is available. The merchandise is shipped directly to the purchaser, f.o.b. Watertown.

Class E sales: These are also sales made by the Hood Rubber Division and involve only flooring material. It is alleged in the complaint, and admitted by the answer, that solicitation of accounts is made for this product by mail or by salesmen reporting to Watertown only. It is further alleged and admitted that such salesmen have no connection with the Seattle office of the Hood Rubber Division; that no salesmen or sales offices concerned with this product are maintained in Washington; and that no stock or inventory of flooring material is maintained here. Orders for the product are mailed by Washington purchasers directly to a San Francisco office, where such merchandise is stocked, or to the main division office at Watertown. The merchandise is shipped directly to the purchaser, f.o.b. Watertown or San Francisco, as the case may be.

Class F sales: These are a special class of sales made by the Hood Rubber Division, pursuant to a contract negotiated between the main division office at Watertown, and the home office of the J. C. Penney Company at New York City. Orders are placed by the Washington outlets of the J. C. Penney Company with their New York office, which, in turn, transmits the orders to the Watertown

office of the Hood Rubber Division. The merchandise is shipped directly to the J. C. Penney Company outlets in Washington as designated by the New York office. Shipments are made f.o.b., Watertown.

The trial court concluded that the gross proceeds from the sales in Classes A, B, C, D, and E were constitutionally includable within the measure of the business and occupation tax payable by The B. F. Goodrich Company. From this portion of the judgment, the company has appealed. The court further held that the gross proceeds from the sales in Class F could not properly be included within the tax assessment, and enjoined the tax commission from collecting any taxes based on sales in this class. From this portion of the judgment, the tax commission has cross-appealed.

The statute, by authority of which it is sought to include within the measure of appellant's tax the proceeds of these sales, is Rem. Rev. Stat., §§ 8370-4 [P.P.C. § 965-1] *et seq.*, as amended by chapter 5, Session Laws of 1950, Extraordinary Session. In pertinent part, this statute reads as follows:

"Section 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: . . .

"(b) Upon every person . . . engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of one-quarter of one per cent;

"The measure of the tax is the value of the products, including by-products, so manufactured regardless of the

place of sale or the fact that deliveries may be made to points outside the state; . . .

"(e) Upon every person . . . engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent; . . .

"Section 6. . . . persons taxable under paragraphs . . . (e) . . . shall not be taxable under paragraphs . . . (b) . . . with respect to extracting or manufacturing of the products so sold."

As amended in 1943, this statute provided that persons taxable as manufacturers should not be taxable as wholesalers. Rem. Supp. 1943, § 8370-6. As so written, we held that it marked an unconstitutional discrimination against interstate commerce, in that it levied a tax upon wholesale activities of those engaged in such commerce, while exempting those who performed the same taxable act, to wit, the sale at wholesale, if they manufactured in the state of Washington. *Columbia Steel Co. v. State*, 30 Wn. (2d) 658, 192 P. (2d) 976; *Weyerhaeuser Sales Co. v. State Tax Commission*, 30 Wn. (2d) 947, 192 P. (2d) 979. In an attempt to cure this defect, the legislature, in its extraordinary session of 1950, rewrote the statute in the form quoted above, so that it now lays a tax equally upon all those selling at wholesale within the state, but further provides that those who are taxed as wholesalers shall not be taxed as manufacturers. The procedure for exemption of those who perform both the taxable acts of the manufacture and sale has thus been exactly reversed; the local manufacturer-wholesaler, instead of being exempt from tax as a wholesaler, is instead exempt as a manufacturer.

[1] Although respondents plainly regard this change as purely verbal (it may well be; but the cases in

this field often turn, unfortunately, on just such verbal niceties), they also assert that it has rendered the statute invulnerable to any attack that an out-of-state manufacturer who sells his product within the state may direct against it on the ground that it unconstitutionally discriminates against him. With this position we agree. All those who sell at wholesale within this state are now taxed equally upon that activity regardless of whether they manufacture in Washington or elsewhere. Because some other state might exercise its undoubted right to tax the privilege of manufacture with respect to goods ultimately sold in Washington (*American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522; see *Freeman v. Hewit*, 329 U. S. 249, 91 L. Ed. 265, 67 S. Ct. 274), this state need not forego its right to tax the business of selling those goods. Each state must derive its revenues from what goes on within its own borders. And if Washington's statute exempts local manufacturers from paying their tax as manufacturers, providing they also pay it as sellers, that, as appellant admits, can be of no concern to one who manufactures out of the state.

Appellant engages in but one local taxable activity—selling—and as to this it is now taxed on a parity with all others who engage in like activity here. Though it be subjected to a threat of multiple taxation not, under the present statute, borne by the local manufacturer-seller, that is but an inevitable consequence of the power of the several states to tax; no constitutional question is involved. See Lockhart, Gross Receipts from Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40, 75, note 155; cf. *Drury The Tailor v. Jenner*, 12 Wn. (2d) 508, 122 P. (2d) 493.

But though this statute may no longer be open to the charge that it is, in the respect under consideration, discriminatory, the question yet remains of whether, as construed by the tax commission, it marks an unconstitutional levy upon interstate commerce. Article 1, section 8, of the Federal constitution, of course, gives to the Congress the power to regulate commerce among the several states; and it has been assumed that this clause restricts the states as to the manner in which they may tax an interstate business. The nature and extent of the restriction, however, remain matters of great uncertainty. In the plethora of cases which have arisen on the subject within recent years, the United States supreme court has been concerned with striking a balance between two conflicting principles: (1) That interstate commerce should be protected from undue interference by state taxation, and (2) that the commerce clause is nevertheless not intended to allow such commerce to escape paying its way. In resolving these principles, the court has not always been doctrinally consistent, and at least from the time (1938) of *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823, 58 S. Ct. 546, 115 A. L. R. 944, the relevant cases have been confusing and contradictory in rationale. Although some knowledge of the historical background of the problem is indispensable to a proper understanding of it, we shall not attempt to review these cases here. A brief, but scholarly, analysis, with reference to most of the important sources, both judicial and academic, which bear upon the matter, may be found in the opinion of Judge Charles E. Clark in *Spector Motor Service v. O'Connor*, 181 F. (2d) 150. Suffice it to say that, at the time the present case was argued before us, there was no certainty as to what test the court would

follow in determining the constitutionality of the application of a gross receipts tax, laid upon the privilege of doing business, to proceeds of sales of the type here involved.

On February 26, 1951, however, the court handed down its opinion in *Norton Co. v. Department of Revenue of Illinois*, 340 U. S. 534, 95 L. Ed. (Adv. Op.) 329, 71 S. Ct. 377, a case which, on its facts, strongly resembles the case at bar. Both parties herein have recognized the importance of this decision to the present inquiry, and both have submitted supplemental briefs containing their views as to its effect. As we deem it controlling, we shall discuss it here in some detail.

From the report of the case in the state court (*Norton Co. v. Department of Revenue*, 405 Ill. 314, 90 N. E. (2d) 737), as well as from the supreme court decision, it appears that the facts in this case were as follows: The Norton Company was a Massachusetts corporation, engaged in the business of manufacturing and selling abrasive machines and supplies. Its main office and plant were located at Worchester, Massachusetts. Under consent from the state of Illinois to do business therein, it operated a branch office and warehouse in Chicago from which it made local sales at retail. No salesmen were employed by the company in Illinois, but it did have a group of engineers available to consult with prospective customers as to their needs. These engineers did not solicit or take orders for goods.

Although neither opinion is explicit on the point, careful reading of both appears to indicate that, aside from sales made out of the Chicago inventory to customers in Illinois (which were not involved in the case),

the company made at least four types of sales to Illinois residents: (1) Sales where the order was received at Chicago and forwarded to the home office at Worcester for filling, with shipment being made from there to Illinois customers via the Chicago office; (2) sales where the order was received at Chicago and forwarded, with shipment being made direct from Worcester to the Illinois customers; (3) sales where the order was sent directly to Worcester, with shipment being made to the Illinois customers via the Chicago office; and (4) sales where the order was sent directly to Worcester, with shipment being made directly to the Illinois customer. All shipments were made f.o.b. Worcester.

Illinois sought to reach the proceeds of all of these sales by virtue of the provisions of its retailers' occupation tax act, which laid a tax "upon persons engaged in the business of selling tangible personal property at retail in this state." Ill. Rev. Stat., chapter 120, § 441. The amount of the tax was measured by the gross receipts from sales so made. The question raised was whether or not such a tax, as applied to the sales described above, offended the commerce clause. The supreme court of Illinois held that it did not, and that Illinois might properly treat all of these transactions as taxable. The United States supreme court affirmed, but with one significant modification; income from sales in the fourth class where the order was sent directly to Worcester, with shipment being made directly to the Illinois customer, was held not subject to the tax.

The variance in the two opinions is due to the different theories with which the two courts approached the problem. Disregarding the portions of the Illinois opinion which attempt to rationalize or distinguish previous

holdings, it is apparent that the court in that case was much influenced by a firm conviction that a state should have the power to tax all activities carried on within its borders provided that it does not "erect barriers which place an out-of-state business at a disadvantage in competing locally within the state." Not to permit the state to reach the interstate retailer would give him, as the courts said, "an unfair advantage over other retail establishments in the same trade"; and, in fact, the court thought, recent supreme court decisions, which it enumerated, had indicated that "immunity to taxes by an interstate retailer is limited to those who merely solicit orders and do not maintain outlets in the taxing state," if, indeed, even so limited a group as this was entitled to such immunity.

The majority of the United States supreme court did not believe that the commerce clause permitted the states to go so far. It agreed that, where a corporation has gone into a state to do local business by state permission, and has set up an office which performs service helpful to its competition for local trade, it may be taxed like any other vendor for sales made in connection with that business. But this, the court held, does not prevent its being tax-free with respect to sales separate and distinct from its local business; though the burden is on the taxpayer to show this dissociation, where it is demonstrated, the sales involved are interstate commerce, and entitled to the same immunity from state taxation as if the corporation had never established an office within the borders of the state.

Three judges, dissenting, took the view that such a corporation should be taxable even for that portion of its business carried on entirely independently of the activ-

ities of its local office. They said, speaking through Mr. Justice Clark:

"In maintaining a local establishment of such magnitude, petitioner has adopted the label of a home-town merchant. After it has received the manifold advantages of that label, we should not give our sanction to its claim made at taxpaying time that with respect to direct sales it is only an itinerant drummer."

This view, obviously motivated by the same policy considerations which had actuated the Illinois court, did not, however, prevail. The majority held that, in the absence of a showing that the services rendered by the Chicago office were not decisive factors in establishing and holding the Illinois market, the state court's judgment crediting that office with the income from all sales that utilized it, either in receiving the order or distributing the goods, was permissible. But it also held that income from orders sent directly to Worcester by the customer, with shipment made directly to him in return, was not reasonably attributable to the local business. Such commerce was "interstate in character," and, in consequence, income resulting from it could not be reached by the Illinois tax.

For our purposes, the crucial sentence in the majority opinion, and the one which sets forth the test we must apply in deciding this case, is the following:

"Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, *Cooney v. Mountain States Telegraph Co.*, 294 U. S. 384, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

It seems clear that, under this test, the sales made by The B. F. Goodrich Company in Classes A, B, and D are

constitutionally taxable. In all of these sales, business is channeled through the company's local outlets, and not only has appellant failed to demonstrate that the services rendered by these offices do not play a significant part in establishing and holding this market, it affirmatively appears that they do so. In this connection, *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, 88 L. Ed. 1304, 64 S. Ct. 1023, is of no assistance to appellant; for, there, the company which Arkansas sought to tax maintained no local office within Arkansas, but operated only through itinerant solicitors; and this fact, as the *Norton Co.* case demonstrates, is sufficient to mark a controlling distinction beween the *McLeod* case and that at bar.

[2] It seems equally apparent from the *Norton Co.* decision that the sales made in classes E and F cannot be reached by the state of Washington under this tax. It is quite true that the supreme court has, on previous occasions, used language which, broadly considered, might suggest that the sales made in class E, at least, could properly be made the subject of a tax of this kind. In *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888, 61 S. Ct. 586, 132 A. L. R. 475, and *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373, 85 L. Ed. 897, 61 S. Ct. 593, the court held that Iowa could impose a *use* tax laid upon gross receipts from retail sales and collectible by the vendor on mail orders sent by Iowa purchasers to out-of-state branches of a corporation doing business within Iowa and filled by direct shipments from these branches to the purchasers. The fact that the company's outlets within the state had not been directly involved in these sales was held to be immaterial with respect to Iowa's power to collect the tax. In the *Sears, Roebuck & Co.* case, the court said:

"Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."

But this line of reasoning was not followed in the *Norton Co.* case; only the dissent of Mr. Justice Clark invoked it; and the majority distinguished the *Nelson* cases, and similar decisions, on the ground that they involved sales or taxes laid upon the local buyer or user, whereas the Illinois tax, like the tax with which we are here concerned, was a tax laid upon the vendor who, with respect to these sales, was in the same position as an extra-state seller upon whom Illinois had no local grip.

[3] Whatever we may think of this distinction from the standpoint of practical effect, our only concern with it here is that it has been made and must be observed. In accordance with it, we are compelled to hold that the class E sales, involving orders sent by the purchasers directly to an office out of the state, and filled by shipment direct to the purchaser, without any intervention on the part of the local office, cannot constitutionally be made the subject of the tax here involved. *A fortiori*, the Class F sales, made pursuant to a contract between the home office of the J. C. Penney Company and the home office of appellant's Hood Rubber Division, with the consummation of which the local office has no concern whatever, are beyond the reach of the state's taxing power, at least with respect to this particular tax.

[4] The only sales involved in the present case about which there might be some doubt under the *Norton Co.*

decision, are those in class C. It will be recalled that these sales are not channeled through the local office. Orders are sent to Portland and filled there, the merchandise being shipped directly to the purchasers. However, it appears that, if no dealer franchise or credit approval has been given the purchasers, the orders are referred to the Washington division office in order that these may be granted or denied. Appellant's argument that, while a franchise and credit approval are conditions precedent to the purchase and sale of merchandise, they are unrelated to the actual purchase of merchandise by the buyer, or to the sale and delivery by the seller, is not without force. Nevertheless, this tax is "paid for the act or privilege of engaging in business activities in Washington." We only interpret the *Norton Co.* case as holding that such a tax may not be levied upon the proceeds from sales with which the local outlet had nothing to do. It is, of course, conceded that a state has the right to tax the privilege of doing local business, and, here, the Washington office unquestionably performs a service essential to the completion of the sales the proceeds of which the state seeks to tax. We are in agreement with respondent that this activity is sufficient to tie the class C sales to the Washington business of The B. F. Goodrich Company, and that Washington may consequently reach the proceeds therefrom through this tax.

Were we free to decide this case differently, we might well do so. Numerous questions must necessarily follow from the conclusions we have here reached. Does the limitation of the operative effect of this tax to what is found to be intrastate commerce actually protect interstate trade from an unjustified levy, or does it merely allow to that trade a special and unwarranted exemption which local business is not permitted to enjoy? And even

if we assume that this sort of taxation, if applied to interstate commerce, would have the inhibitory effect which the supreme court has held the constitution sought to forbid, have we removed that burden when we subject receipts of certain sales to taxation merely because they were made with the assistance of a local outlet of a corporation, while at the same time allowing those sales, made through out-of-state branches of the same company, to go tax free? Cannot it be argued that this distinction is a purely arbitrary one, with no relation whatever to the real problem, which would seem to be the economic impact of the tax, as assessed, upon commerce moving across state lines? Finally, even if this distinction be accepted as valid, what of the difficulty of drawing it in a borderline situation such as that presented by the class C sales in the instant case? The *Norton Co.* case would seem to indicate that the supreme court is splitting hairs a little further on the side of the state's power to tax than it was at the time (1918) of *Cheney Bros. Co. v. Commonwealth of Massachusetts,* 246 U. S. 147, 62 L. Ed. 632, 38 S. Ct. 295; but it also appears to demonstrate that the technique employed in that case, for distinguishing local from interstate commerce, is once again the one in vogue.

These questions, however, are by no means novel; they have often been raised, and the supreme court has often considered them, as an analysis of its cases will readily reveal. It scarcely needs be said that with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of that court no matter what our private views may be. In any event, there are few subjects in the entire field of constitutional law so elusive as that of state taxation of interstate commerce, and it would be a sanguine individual indeed who could assert that he had found the ultimate

solution to a problem as complex in its ramifications as that presented here. Perhaps, Mr. Justice Black's reiterated view that only Congress is competent to dispose of the matter in all of its aspects will eventually prove to offer the soundest solution. Dissent, *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 442, 83 L. Ed. 272, 59 S. Ct. 325; dissent, *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 316, 82 L. Ed. 1365, 58 S. Ct. 913; concurring opinion, *Northwest Airlines v. Minnesota*, 322 U. S. 292, 301, 88 L. Ed. 1283, 64 S. Ct. 950.

We may note in closing that appellant has submitted a memorandum concerning the very recent case of *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L. Ed. (Adv. Op.) 435, 71 S. Ct. 508. There, Connecticut's business tax act, which provided for a franchise tax, measured by net income, upon all corporations doing business within the state, was held unconstitutional as applied to a carrier whose business was entirely interstate. We shall not analyze this case in detail, for the situation presented to the court, though it involved the basic problem of the power of the state to tax interstate commerce, was not analogous to that presented here. The *Norton Co.* case (which the majority in the *Spector Motor Service* case did not, apparently, feel it necessary to distingush or even to mention) still appears to us controlling upon its facts.

With the exception of its holding with respect to the sales denominated Class E, the proceeds of which we hold to be not constitutionally taxable under the state's business and occupation tax, the judgment of the trial court is affirmed in its entirety. The cause will be remanded with direction to grant injunctive relief as prayed for with respect to the sales denominated Class E.

ALL CONCUR.